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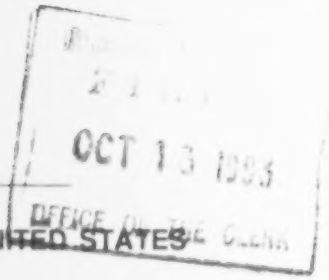

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL LEWIS, DIR. / RIZONA DEP'T. OF COR.,
GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

vs.

U. S. DISTRICT COURT, DIST. OF ARIZONA,
RESPONDENT.

M. E. CORRELL, J. R. VILAFUERTE, J. A. ARNETT,
REAL PARTIES OF INTEREST

PETITION FOR WRIT OF CERTIORARI
TO THE U. S. COURT OF APPEALS, 9th CIRCUIT

AMICUS CURIAE
STATE OF MISSOURI

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QUESTION PRESENTED

I.

Did the Court of Appeals abuse its discretion by refusing to issue a writ of mandamus to supervise the orderly administration of the Arizona District Court when the evidence clearly demonstrated that the District Court had shown a constant refusal to rule promptly on its pending capital habeas corpus cases.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is a state within the territorial jurisdiction of the United States Court of Appeals for the Eighth Circuit and has capital habeas corpus litigation pending before the federal district courts. The States of Arkansas, Missouri and Nebraska have experienced prejudicial delay in the resolution of capital habeas litigation by the district courts. Accurate and expeditious consideration of capital habeas litigation is in the interest of both the death-row prisoner and the *amicus curiae*.

The interests of the State of Missouri are both substantial and continuing.

SUMMARY OF THE ARGUMENT

In the case at bar, Petitioners Lewis and Woods have clearly established good cause for the Court to issue a writ of certiorari under Supreme Court Rule 10.1. Petitioners have shown a significant question, the Arizona District Court's delay in consideration of the capital habeas corpus litigation of Correll, Villafuerte and Arnett, a question that cried for consideration by the United States Court of Appeals for the Ninth Circuit. That court, however, summarily declined to issue a remedial writ of mandamus.

This brief, by *amicus curiae* Missouri will discuss the situations in Arkansas, Missouri and Nebraska, states within the territorial jurisdiction of the United States Court of Appeals for the Eighth Circuit, concerning delay in resolving capital habeas corpus litigation by the district courts. *Amicus curiae* will discuss over thirty capital habeas cases that have been pending in the district courts since before 1991. Supreme Court Rule 10.1. This brief will also discuss efforts by these states to have this problem reviewed and corrected by the court of appeals. That appellate court has attempted to solve the problem in some situations, but when remedies are attempted, the remedies have been ineffective. Finally, *amicus curiae* will discuss why petitioners' proposed solution should be more effective than the *status quo*.

ARGUMENT

The purpose of this brief by *amicus curiae* is twofold. First, *amicus curiae* will describe, systematically, the problem of delay in capital habeas litigation by the district courts within the territorial jurisdiction of, the United States Court of Appeals for the Eighth Circuit. Second, *amicus curiae* will describe piecemeal attempts by the court of appeals to solve the problem, how these efforts have been unsuccessful, and the lesson to be learned in fashioning relief.

The States of Arkansas, Missouri and Nebraska have capital punishment statutes and significant numbers of inmates under sentence of death. Arkansas has about thirty-seven people under sentence of death. Death Row, U.S.A. 15 (NAACP Legal Defense & Educational Fund, Inc. Summer 1993). Missouri has about eighty-four people on its death row. *Id.* at 28. Nebraska has about eleven people on its death row. *Id.* at 29. If these individuals are unsuccessful in vacating their convictions and sentences in state court, 28 U.S.C. § 2254(b), (c) (exhaustion requirement), they will pursue relief in federal court under 28 U.S.C. § 2254. *Amicus curiae* believe that if the federal government extends the privilege of the writ of habeas corpus to death-row inmates, then the federal government should obligate itself to conduct accurate and expeditious consideration of the litigation.

A. Delay in Capital Habeas Litigation in the Eighth Circuit

Amicus curiae will discuss over thirty capital habeas cases that were filed with the district courts before 1991. Some of these cases have been pending for over a decade.

1. Decade-Long Capital Habeas Litigation

The most egregious example of slow resolution of capital cases by district courts in this Circuit is Miller v. Lockhart, No. PB-C-81-152 (E.D. Ark.). In that case, the stay of execution was entered in May, 1981. 515 F. Supp. 3 (E.D. Ark. 1981). Twelve and a half years later the litigation continues under consideration by the district court. In Hill v. Lockhart, No. PB-C-82-375 (E.D. Ark.), the district court required eleven years of contemplation before issuing the writ. 824 F. Supp. 1327 (E.D. Ark. 1993). In Ford v. Lockhart, No. PB-C-82-0431 (E.D. Ark.), the habeas litigation has been pending for eleven years without decision.

These decade-long federal district-court habeas corpus litigations are unfair to the prisoner and unfair to the state. Rust v. Clarke, 960 F.2d 72, 73 (8th Cir. 1992). While the remaining examples of delay in capital habeas corpus litigation that will be discussed by *amicus curiae* are not decade-long, the delays are worthy of repudiation by this Court without distinction between the lengths of the delay.

> We . . . turn directly to the four arguments Gacy has culled from more than one hundred raised at one or another stage of this litigation, now fourteen and one-half years old. Gacy has in this sense already escaped the judgments of execution, for judge and jury cannot decide whether a murderer will die, but only how soon.

Gacy v. Welborn, 994 F.2d 305, 306 (7th Cir. 1993) (emphasis in original). Whether the delay in resolving a capital

habeas case is six months or twelve years is irrelevant in light of the effect such delay has upon the system.

2. Cases Pending for Three to Nine Years

The following discussion of delay in capital cases concerns only those that have been pending in the district courts of Arkansas, Missouri and Nebraska since before January 1, 1991. *Amicus curiae*, for the sake of brevity, will not discuss capital habeas cases that have been filed since then. The Court should not interpret this lack of discussion as condoning two-year delays but condemning three-year delays. All delays in resolving capital habeas litigation should be condemned by this Court.

a. Arkansas

There are five additional examples of delay by the Arkansas district courts. Earl Van Denton and Paul Ruiz filed their petitions for writ of writ of habeas corpus in 1989. Four years later, the litigations continue without resolution. Ruiz v. Lockhart, No. PB-C-89-395 (E.D. Ark.). Charles Singleton's first petition for writ of habeas corpus was denied by the Eighth Circuit. Singleton v. Lockhart, 962 F.2d 1315 (8th Cir.), *cert. denied*, 113 S.Ct. 435 (1992). The second petition has been pending before the district court since 1990. Singleton v. Lockhart, No. PB-C-90-323 (E.D. Ark.). Eugene Perry's first petition for writ of habeas corpus was denied by the court of appeals in 1989. Perry v. Lockhart, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989). The second petition has been pending before the district court since January 17, 1990. Perry v. Lockhart, No. PB-C-83-275 (E.D. Ark.). Marion Pruett filed his first petition for writ of habeas corpus in early 1988. Five years later, the

district court has not decided the litigation. Pruett v. Lockhart, No. PB-C-88-195 (E.D. Ark.). Mark Gardner filed his first petition for writ of habeas corpus early in 1989. Again, after the passage of four years, the district court has not decided this habeas litigation. Gardner v. Lockhart, No. PB-C-89-99 (E.D. Ark.). These five examples from Arkansas, along with the decade-long examples of Miller, Hill and Ford amply demonstrate the problem the State of Arkansas has with its federal district courts.

b. Nebraska

The situation in Nebraska is no better. There are six cases from that state that warrant discussion. Michael Anderson filed his petition for writ of habeas corpus on November 7, 1984. Anderson v. Hopkins, No. CV84-L-741 (D. Neb.). Almost nine years later, the litigation continues before the district court. Likewise, Peter Hochstein also filed his petition for writ of habeas corpus in November, 1984. Hochstein v. Hopkins, No. CV84-L-755 (D. Neb.). That litigation also continues before the district court. The habeas litigation involving Carey Moore is now over, with the district court's grant of relief affirmed. Moore v. Clarke, 904 F.2d 1226 (9th Cir.), *cert. denied*, 112 S.Ct. 1995 (1992). Nonetheless, it is appropriate to point out that the litigation before the district court took almost four years to complete. Moore v. Clarke, No. CV84-L-754 (D. Neb.). Randolph Reeves filed his habeas corpus petition on July 27, 1990. Reeves v. Clarke, No. CV90-L-0311 (D. Neb.). Over three years later, the district court has not decided the petition. Finally, Robert Williams began his federal habeas corpus litigation on March 3, 1987. Williams v. Clarke, No. CV87-L-134 (D. Neb.). Six years later, on March 16, 1993, the district court decided the litigation. Williams v. Clarke, 823

F. Supp. 1487 (D. Neb.). Again, this survey of capital habeas litigation from Nebraska, along with Rust v. Clarke, 960 F.2d at 72, amply shows a pattern of delay by the district court of Nebraska in fulfilling its responsibility to resolve capital habeas litigations.

c. Missouri

Finally, *amicus curiae* will discuss some cases from Missouri. Anthony LaRette filed his petition for writ of habeas corpus on April 11, 1986. Anthony LaRette v. Paul Delo, No. 86-753C(2) (E.D. Mo.). Seven years and a month later, the district court denied the petition. The district-court litigation is not final since the district court has not ruled on the Rule 59(e) motion filed on May 24, 1993.

There are two petitions filed in 1988 that have not been decided. In Elroy Preston v. Paul Delo, No. 88-0991C(4) (E.D. Mo.), the petitioner filed his petition for writ of habeas corpus on January 29, 1988. The district court has not yet decided the litigation. In Stephen Johns v. Paul Delo, No. 88-1196C(2) (E.D. Mo.), Mr. Johns filed his petition for writ of habeas corpus on June 23, 1988. The district court has not yet decided the petition notwithstanding the passage of five years.

Eight initial capital habeas cases were filed in 1989 that require discussion. In Emmett Nave v. Paul Delo, No. 89-0447C(4) (E.D. Mo.), Mr. Nave filed his petition for writ of habeas corpus on March 14, 1989. On June 17, 1993, four years and three months later, the district court issued its order granting relief. Richard Zeitvogel filed his petition for writ of habeas corpus on May 26, 1989. Zeitvogel v. Delo, No. 89-0510-CV-W-9 (W.D. Mo.). Almost four and a half

years later, the district court has not rendered an opinion. Samuel McDonald v. Paul Delo, No. 89-1282C(4) (E.D. Mo.). Four years have passed, but the district court has not decided the case. Marvin Jones, a septuagenarian, filed his petition for writ of habeas corpus on October 6, 1989. Marvin Jones v. Paul Delo, No. 89-1891C(8) (E.D. Mo.). Four years have passed, and the district court has not decided his case. Bruce Kilgore filed his petition for writ of habeas corpus about the same time as Mr. Jones. The district court has not decided that case either. Bruce Kilgore v. Paul Delo, No. 89-1892C(2) (E.D. Mo.). Robert Driscoll also filed his petition for writ of habeas corpus on October 6, 1989, Robert Driscoll v. Paul Delo, No. 89-1894C(6) (E.D. Mo.); however, that case, too, has not been decided. Stanley Lingar filed his petition for writ of habeas corpus a few days later. That case also has not been decided. Stanley Lingar v. Paul Delo, No. 89-1954C(4) (E.D. Mo.). William Boliek filed his petition for writ of habeas corpus on April 13, 1989. William Boliek v. Paul Delo, No. 89-4076-CV-C-5 (W.D. Mo.). Four years and six months later, there is no decision from the United States District Court for the Western District of Missouri.

There are nine capital habeas corpus petitions that were filed in 1990 that have yet to be decided by the district courts. Jerome Mallett began his capital habeas litigation on March 9, 1990, Jerome Mallett v. Paul Delo, No. 90-437C(2) (E.D. Mo.), but it continues unresolved. Roy Roberts filed his petition for writ of habeas corpus on March 30, 1990. Three years and six months later, there is no decision by the district court. Roy Roberts v. Paul Delo, No. 90-0592C(2) (E.D. Mo.). Robert Walls filed his petition for writ of habeas corpus on March 30, 1990, Robert Walls v. Paul Delo,

No. 90-0607C(2) (E.D. Mo.), but the district court has not decided that case yet.

The situation involving William R. Jones is unique. Mr. Jones filed his petition for writ of habeas corpus on October 16, 1990, about three years ago. William R. Jones v. Paul Delo, No. 90-0939-CV-W-8 (W.D. Mo.). The case has not been decided by the district court. On September 9, 1993, during the early morning hours, Williams Jones escaped the custody of the Missouri Department of Corrections. He was eventually subdued in Louisville, Kentucky, later that day. This illustrates a public-safety policy reason in support of accurate and expeditious resolution of capital habeas cases. Public safety will be protected by more expeditious review of capital habeas corpus litigation.

Joseph Amrine initiated his capital habeas corpus litigation on the same day as Mr. Jones. He, too, has received no decision from the federal district court. Fortunately, he has not escaped custody. Joseph Amrine v. Paul Delo, No. 90-0940-CV-W-2 (W.D. Mo.). Richard McMillin also began his capital habeas litigation on October 16, 1990. Richard McMillin v. Paul Delo, No. 90-0942-CV-W-1 (W.D. Mo.). The district court has not decided that litigation. Eric Clemmons also filed his petition for writ of habeas corpus on that day. Eric Clemmons v. Paul Delo, No. 90-0943-CV-W-6 (W.D. Mo.). There is no decision from the district court. A day later, Eric Schneider filed his petition for writ of habeas corpus with the District Court for the Eastern District of Missouri. That district court has not rendered a decision. Eric Schneider v. Paul Delo, No. 90-1968C(5) (E.D. Mo.). Finally, Moses Young filed his petition for writ of habeas corpus on December 7, 1990, and the district court

has not rendered a decision on it. Moses Young v. Paul Delo, No. 90-2053C(6) (E.D. Mo.).

There are eleven unresolved initial petitions for writ of habeas corpus filed by Missouri death-row prisoners in 1991. Likewise, two initial petitions filed in 1992 and two petitions filed in 1993 have not been resolved by the district courts.

3. Delay in Successive Petitions

Some final comments are necessary concerning delay in second petitions for writ of habeas corpus. The delays in Arkansas' successive habeas litigation concerning Singleton and Perry have been discussed earlier. In Doyle Williams v. Paul Delo, No. 91-0230-CV-W-8 (W.D. Mo.), the inmate pursued his second petition for writ of habeas corpus on March 18, 1991. Two and a half years have passed without a decision from the district court. In Lloyd Schlup v. Paul Delo, No. 4:92CV00443JCH (E.D. Mo.), the petitioner filed his successive petition on March 11, 1992. Over sixteen months later, on August 23, 1993, the district court denied relief. The problem of delay by the Missouri district courts is not confined to initial petitions for writ of habeas corpus. This problem also includes second petitions as well.

B. The Remedy

Petitioners request this Court to establish a 120-day time limit for ruling on dispositive motions, a 30-day time limit for ruling on procedural motions, and a 180-day time limit for scheduling an evidentiary hearing (Petition, pp. 16-18). If the district court does not comply with these deadlines, a show-cause order would automatically issue from the

appellate court (Petition, p. 17). Petitioners' proposals have merit and should be an improvement over the piecemeal mandamus litigation currently used.

1. Reasonableness of Proposal

Accurate and expeditious capital habeas litigation is not a fantasy. Some examples illustrate that it can be done.

In Byrd v. Armontrout, the petition for writ of habeas corpus was filed on October 23, 1987. After appointment of counsel, amendment of the petition and further pleadings, the district court denied relief on May 27, 1988. 686 F. Supp. 743, 743, 751 (E.D. Mo. 1988), *aff'd*, 880 F.2d 1 (8th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990). In Blair v. Armontrout, 643 F. Supp. 785, 786 (W.D. Mo. 1986), *aff'd*, 916 F.2d 1310 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 89 (1991), the district court decided the litigation within three months of the filing of the traverse. Likewise, in Smith v. Armontrout, 692 F. Supp. 1079, 1084-85 (W.D. Mo. 1988), *aff'd*, 888 F.2d 530 (8th Cir. 1989), *stay denied*, 493 U.S. 1039 (1990), the district court decided the litigation within six months of the filing of the amended petition. These examples illustrate the ability of the district courts to comply with a rule like that proposed by petitioners (Petition, pp. 14-16).

2. Ineffective Appellate-Court Orders

In re Paul Delo, No. 92-3468 (8th Cir. Dec. 11, 1992), Anthony LaRette filed his petition for writ of habeas corpus on April 11, 1986. Six and a half years later, the district court had not decided the petition. After multiple inquiries to the district court concerning the habeas litigation,

the state sought relief from the court of appeals. The appellate court issued the writ of mandamus and concluded: "[T]he underlying habeas case brought by LaRette must be expedited and not delayed any longer." The district court was ordered to consider the issues presented in the habeas corpus petition and to enter final judgment within one hundred fifty (150) days of December 11, 1992. While the district court denied federal habeas corpus relief on the 150th day (May 10, 1993), LaRette's motion under Fed. R. Civ. P. 59(e) has been pending before that court for almost five months without a decision.

In the Larry Griffin litigation, the district court was given one hundred eighty (180) days to resolve the remand issues. Griffin v. Armontrout, 961 F.2d 793, 794 (8th Cir.) (requiring district court to resolve new claims within 180 days). At the request of Mr. Griffin, the court of appeals stayed the 180-day time period until this Court resolved the state's petition for writ of certiorari, a petition denied by this Court on October 5, 1992. Delo v. Griffin, 113 S.Ct. 296 (1992). Afterward, the court of appeals entered an order beginning the 180-day period on October 23, 1992. The time period was to expire on April 21, 1993.

On April 21, 1993, the district court requested by letter until May 7, 1993, in which to complete its responsibility under the court of appeals' mandate. The court of appeals granted the district court's request. On May 6, 1993, the district court requested an indefinite time in which to comply with the court of appeals' mandate. The state opposed the district court's request, and on May 17, 1993, the court of appeals informed the district court that it had until June 15, 1993, in which to comply with the appellate court's mandate. On June 15, 1993, the district court requested

another extension due to "exigent circumstances." The district court did not explain what "exigent circumstances" meant. Nonetheless, the court of appeals granted the district court until July 2, 1993, in which to comply with the appellate court's mandate. On July 2, 1993, the district court entered an order resolving the remand issues, but allowing Mr. Griffin to file a third amended petition. The district court did not indicate when it intended to decide the third amended petition. The state filed with the appellate court a "Motion to Enter Appropriate Orders." Two months passed before the appellate court granted the state's motion on September 9, 1993. The appellate court found that the district court's July 2, 1993 order "was not, of course, the final consideration we directed on April 14, 1992." Griffin v. Delo, No. 90-2377, slip op. at 1 (8th Cir. Sept. 9, 1993). The appellate court ordered the district court to decide the third amended petition within forty-five days of September 9, 1993. Id.

There are other examples of unsuccessful actions by the appellate court. In In re A. L. Lockhart, No. 90-1489 (8th Cir. May 24, 1990), the State of Arkansas filed a petition for writ of mandamus concerning the Eddie Miller v. A. L. Lockhart litigation (U.S.D.C. No. PB-C-81-152) and the Darryl Hill v. A. L. Lockhart litigation (U.S.D.C. No. PB-C-82-375). Miller's stay of execution had been entered on May 11, 1981. Miller v. Lockhart, 515 F. Supp. 3 (E.D. Ark. 1981). Mr. Hill's petition had been pending since 1982. After ordering a response from the district court, the court of appeals denied the petition for writs of mandamus. The court, however, ordered: "The district court should give expedited consideration to disposition of the cases referred to in the petition." In re A. L. Lockhart, No. 90-1489 (8th Cir. May 24, 1990). The Arkansas district court did not comply

with the directive of the court of appeals since it took over three years for it to decide the Hill litigation. Hill v. Lockhart, 824 F. Supp. 1327 (E.D. Ark. 1993). The district court has not decided the Miller litigation even though almost three and one-half years have passed since the court of appeals ordered expedited consideration.

The delay by the Arkansas district courts in resolving capital habeas cases has created friction between state and federal judiciaries. Members of the Arkansas Supreme Court have spoken out about the delay.

> Unfortunately, other abuses of our post-conviction remedies continue to occur besides the one we have here. In our recent case of Robertson v. State, 298 Ark. 131, 765 S.W.2d 936 (1989), Justice Hickman, in a concurring opinion, recounted the history of our review of capital cases. *See also* Fretwell v. State, 289 Ark. 91, 708 S.W.2d 630 (1986) (Hickman, J., concurring), and Ruiz & Van Denton v. State, 280 Ark. 190, 655 S.W.2d 441 (1983) (Hickman, J., concurring). Justice Hickman cited capital cases that appeared to have come to the end of the direct appeal and post-conviction relief processes, only to find that the cases--some of which he identifies by name--have entered the federal judicial machinery where they seemingly disappear. As Justice Hickman noted, our court affirmed Eddie Lee Miller's conviction in 1980, but Miller filed a habeas petition in federal district court in 1981. Eight years have passed and the federal court has failed to rule on

> Miller's petition. Clay Anthony Ford['s] and Darrell Wayne Hill's cases have been pending in federal district court since January 1983 and February 1983, respectively, and no final decisions, as yet, have been entered by the federal court. There are others, as well, but it is of little value to repeat here those cases already fully identified in Justice Hickman's earlier concurring opinion. Suffice it to say, that despite this court's best efforts to expedite and review these serious appeals and post-conviction petitions, these cases inevitably end up in the federal judicial system, where too often they languish.

Whitmore v. State, 299 Ark. 55, 771 S.W.2d 266, 268 (1989); *see also* Davis v. State No. CR 92-1385, slip op. at 18-22 (Ark. Sup. Ct. Oct. 4, 1993) (Glaze, J., concurring); O'Rourke v. State, 300 Ark. 323, 778 S.W.2d 938, 940 (1989) (Glaze, J., dissenting); Robertson v. State, 298 Ark. 131, 138-39, 765 S.W.2d 936, 941-44 (1989) (Hickman, J., concurring). Justice Glaze summarized:

> In fact, the manner in which the judiciaries as a whole, and the federal judiciary in particular, have handled these capital cases has been a public disgrace!

Id. at 940. Perhaps the term "friction" is an understatement.

In Mallett v. Delo, No. 92-2023 (8th Cir. Oct. 14, 1992) (unpublished), the court of appeals reversed the judgment of the district court and remanded it back for consider-

ation of the merits of Mr. Mallett's claims. The court of appeals pointed out:

> While this is a first petition for a writ of habeas corpus, proceedings to this point have consumed considerable time, and we are confident that the district court will proceed to the merits and decide the case carefully and expeditiously.

Id. slip op. at 2. About a year has passed without a decision by the district court.

The foregoing outlines the problems resulting from piecemeal mandamus litigation and other orders, requests and suggestions by the appellate court to the district courts. The automatic show-cause order system proposed by petitioners may solve these problems.

Periodically, this Court speaks of the "friction" that federal habeas corpus review creates between the federal and state systems of government. As the mandamus litigation and the Griffin litigation illustrate, the "friction" between the state and federal governments is quite high when the United States district court is a respondent in mandamus litigation. The "friction" is high when the state complains to the supervisory court of the lack of success of efforts by the district court to resolve a case accurately and expeditiously. There also may be "friction" when a district court requests additional time to comply with a mandate and the state must oppose that request as unreasonable. "Friction" is inherent to mandamus litigation. While the automatic show-cause order systems suggested by petitioners may have similar problems, those problems should be minimal if the courts of appeal

fairly enforce the time deadlines without prompting from the states.

The show-cause system proposed by petitioners should also be less cumbersome than the current mandamus litigation. Capital habeas litigation should not be complicated by rounds of collateral extraordinary litigation before the appellate courts. Further, the proposal will be more efficient than mandamus litigation.

The foregoing policy reasons support implementation of the system suggested by petitioners. The suggested time rules will not be a panacea, but they should prevent the never-ending district-court litigation described by petitioners and *amicus curiae*. The rules are certainly better than nothing, the *status quo*.

CONCLUSION

For all of the above-stated reasons, *amicus curiae* respectfully request that the Court grant petitioners' petition for writ of certiorari and order the relief requested by petitioners on behalf of the State of Arizona.

Sincerely,

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